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IN THE

Supreme Court of the United States

October Term, 1965

No. 476

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1780; OPERATIVE PLASTERERS & CEMENT MASONS, INTERNATIONAL ASSOCIATION, LOCAL 797; INTERNATIONAL HOD CARRIERS & COMMON LABORERS, LOCAL 872; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12; BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA, LOCAL 159; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 357; INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, LOCAL 433; UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY, LOCAL 525,

Petitioners,

v.

REYNOLDS ELECTRICAL & ENGINEERING CO., INC.,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

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v.

REYNOLDS ELECTRICAL & ENGINEERING CO., INC.,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nevada, entered April 23, 1965, Petition for Rehearing, denied May 24, 1965.

Citations to Opinions Below.

The opinion of the Supreme Court of the State of Nevada is printed in Appendix A hereto, *infra,* App. p. 1 and is reported in 401 P. 2d 60. The order of the Supreme Court of the State of Nevada denying rehearing without opinion is printed in Appendix B hereto, *infra,* App. p. 18.

Jurisdiction.

The judgment of the Supreme Court of the State of Nevada was entered on April 23, 1965. A timely petition for rehearing filed and was denied on May 24, 1965. The jurisdiction of this Court is involved under 28 U.S.C., §1257(3), since a title right, privilege or immunity is specially set up or claimed under Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C 185(a).

Questions Presented.

1. Whether a fundamental and long-lasting change in the relationship of the parties to a collective agreement prior to the demand for arbitration would be a circumstance which, alone or among others, would release a party from his promise to arbitrate?

2. Whether the circumstances including the issuance of directions by the Atomic Energy Commission would release a party to a collective agreement from his promise to arbitrate although the other party did not flatly refuse to participate in the arbitration process?

3. Whether a Federal agency absent legislative authority can constitutionally abolish by administrative fiat contract rights contained in a collective agreement freely negotiated between a union and a Government contractor?

Statutes Involved.

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), reads as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Statement of the Case.

The judgment of the Supreme Court of the State of Nevada resulted from an appeal by the respondent, Reynolds Electrical & Engineering Co. (hereinafter "Reynolds"), from a lower court judgment that Reynolds had breached its collective bargaining agreements with the petitioner unions, and directing Reynolds to place into effect, retroactively, and maintain certain travel time pay practices which had been in effect prior to certain Atomic Energy Commission (hereinafter "AEC") directives to which further reference will be made hereinbelow.

Reynolds is an employer in interstate commerce within the intendment of Sec. 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), and engaged by the United States Government as a cost-plus contractor in the construction, maintenance and support activities for the Atomic Energy Commission (AEC) at the Nevada Test Site.

Each of the collective bargaining agreements provides that grievances would be handled according to a specified procedure.

The lower court assumed the authority to exercise remedial power and resolved the dispute about the interpretation and/or application of the said agreements to travel time pay on the merits. It believed it proper to do because, in its view, the dispute was not arbitrable and, in any event, Reynolds had waived and repudiated the grievance and arbitration procedures. The Supreme Court of the State of Nevada disagreed on both issues and set the lower court judgment aside.

The Supreme Court of the State of Nevada held that the circumstances failed to support the Trial Court findings that Reynolds, by its conduct, had either waived or repudiated the contractual grievance or arbitration procedures.

The Supreme Court of the State of Nevada noted that there was absent a flat refusal by the employer to participate in the arbitration process and that the breach of said agreements by the employer was survived by the arbitration provisions.

However, there was present in the record the following unrefuted facts:

The employer, Reynolds, discontinued a travel time pay practice which had been followed for many years as a custom and practice consistent with written collective bargaining agreements solely as a result of a directive of the Atomic Energy Commission. The opin-

ion of the Supreme Court of the State of Nevada recognized this fact in the following language:

> "In December 1962 Reynolds designated Area 400 itself as the reporting point for basic trade employees working in Area 400, and in March 1963 did the same for specialty trade employees working there. Travel time pay for employees who had theretofore reported to Camp Mercury was stopped. *Reynolds did so at the direction of the Atomic Energy Commission.* A campsite was not established. A grievance resulted."

The circumstances which the petitioners contended released them from their obligation to arbitrate were as follows:

(1) There was oral testimony that an employer representative said, even if the problem could be resolved through a joint committee meeting, there was no way the union official could effectuate the settlement;

(2) There was oral testimony that an employer representative said that the employer could not accede to a decision in favor of a union, because the employer had to abide by the directive issued by AEC.

(3) The employer was found by the Supreme Court of the State of Nevada to have failed to comply with a final and binding award of the Sheet Metal Workers Local Joint Adjustment Board.

(4) When another union thereafter requested that the dispute be arbitrated, the employer answered [Ex. F];

> ". . . in our opinion action other than the actions taken thus far would be premature, and the resolution of this matter should be accomplished by the processes which are now engaged at the Washington level in an attempt to resolve the entire issue."

The activities at the Washington, D.C. level shown by the record were as follows:

AEC considered labor costs excessive at the Nevada test site and so advised the Secretary of Labor. AEC thought it was possible to resolve the expenditure issue by negotiation, rather than by a ruling of a Government board in Washington, D.C. As a result, a special committee, designated as the Nevada Test and Space Site Construction Labor Board (hereinafter "NTSSCLB") was created on August 20, 1962. The NTSSCLB was authorized to exercise advisory functions only. Meetings of NTSSCLB followed in Washington, D.C. and Las Vegas, Nevada.

On December 7, 1962 Reynolds, in accordance with an AEC directive [Ex. O] terminated the onsite travel time pay to the basic trades.

On January 4, 1963, in an interim report and decision, NTSSCLB approved the said action, applied to the basic trades, stating that it would

> "... correct the uneconomical practices complained of by the Atomic Energy Commission and should provide the basis for cost reimbursement for the employment of these crafts and should apply to all cost work and to all fixed price construction contracts let after December 7, 1962" [Ex. A].

On January 30, 1963, in a second interim report and decision, NTSSCLB concluded in a pertinent portion thereof as follows [Ex. B].

> "The present practice for the four specialty crafts employed at NRDS (the 400 Area) is to receive both subsistence and a travel allowance (or travel on employers' time.) The Board decides . . ., that in

order to eliminate uneconomical practices, all construction crafts should now report to NRDS (the 400 Area) on their own time. The Board advises the AEC that payment for time spent in traveling from Camp Mercury to and from NRDS (the 400 Area) should not provide the basis for cost reimbursement for cost plus work and for fixed price construction contracts let after December 7, 1962."

Effective March 4, 1963, in accordance with AEC instructions, Reynolds ceased the payment of the travel time pay to the specialty crafts.

Reasons for Granting the Writ.

In *Local Union No. 721, United Packinghouse Workers v. Needham Packing Co.*, 376 U.S. 247, 253, 84 S. Ct. 773, 777, 11 L. Ed. 2d 680, the Supreme Court of the United States engaged in the observation that:

> "Whether a fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate, we need not decide, since the undeveloped record before us reveals no such circumstance."

On the decisions as they stand, the only basis on which the courts have dealt with the question except as a matter of actual repudiation. See *Minnesota Joint Bd., A.C. Wkrs. v. United Garment Mfg. Co.* (8 Cir. 1964), 338 F. 2d 195, 199.

The record herein permits and justifies the important questions arising from a situation wherein an employer did not flatly refuse to participate in the arbitration proc-

ess, but by reason of a combination of circumstances, including Federal intervention by directives, the union should have an opportunity to argue its right to be released from its promise to arbitrate.

Petitioners raised the constitutional issues below on the basis that the Supreme Court of the State of Nevada acceded to the validity of the AEC directives by in effect ordering arbitration of disputes arising solely as a result of such AEC directives. Reynolds was merely a conduit through which the United States Government promulgated directives that adversely affected the rights of the petitioners under their collective bargaining agreements.

The constitutional questions are serious, because Congress has enacted no legislation authorizing a modification of a collective bargaining agreement or a custom or practice consistent with a collective bargaining agreement in effect at a Government job, by means of any administrative regulation, order, ruling, approval or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency.

A ready contrast is available in 29 U.S.C. § 258, the Portal-to-Portal Act of 1947, 61 Stat. 84-90.

The questions raised herein are important, because a decision on the merits will provide specific guidelines for the degree of Federal intervention in the collective bargaining processes in the atomic energy program.

AEC Procurement Regulation 9-12.101(e). (AECPL Cir. 7, December 28, 1961) [Ex. Q]. states in its pertinent portion as follows:

> "(e) *Collective bargaining.* The AEC desires that collective bargaining in the atomic energy program be carried on insofar as possible under the arrangements normally in American industry."

The record in this case presents a substantial question whether the AEC has acted in excess of authority permitted by its own regulations.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON GALANE,
Counsel for Petitioners.

APPENDIX A.

Opinion.

In the Supreme Court of the State of Nevada.

Reynolds Electric & Engineering Co., Inc., Appellant, v. United Brotherhood of Carpenters and Joiners of America, Local Union 1780, et al., Respondents. No. 4761.

Appeal from judgent of the Eighth Judicial District Court, Clark County; David Zenoff, Judge. *The judgment for Sheet Metal Workers International Association, Local Union 83, is affirmed. The judgment in all other respects is reversed.*

John W. Douglas, Assistant United States Attorney General; Morton Hollander and John C. Eldridge, Attorneys, Department of Justice; all of Washington D.C.; and John W. Bonner, United States Attorney, of Las Vegas, for Appellant.

Morton Galane, and George Rudiak, of Las Vegas, for Respondents.

By the Court, Thompson, *J.*:

The appeal is from a judgment declaring that Reynolds Electrical and Engineering Co., Inc. (Reynolds) breached its collective bargaining agreements with various unions,[1] and directing Reynolds to place into effect,

[1]The unions are: United Brotherhood of Carpenters & Joiners of America, Local 1780; Operative Plasterers & Cement Masons, International Association, Local 797; International Hod Carriers & Common Laborers, Local 872; International Union of Operating Engineers, Local 12; Brotherhood of Painters, Decorators & Paperhangers of America, Local 159; International Brotherhood of Electrical Workers, Local 357; International Association of Bridge, Structural & Ornamental Ironworkers, Local 433; United Association of Journeymen & Apprentices of the Plumbing & Pipe-

retroactively, and maintain certain travel time and shift differential pay practices which had been in effect before December 10, 1962.

Reynolds is an employer in interstate commerce within the intendment of Sec. 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185(a), and engaged by the United States government as a cost-plus contractor in the construction, maintenance and support activities for the Atomic Energy Commission (AEC) at the Nevada test site. The event precipitating this litigation was a strike called and a picket line established by the unions at the test site in April 1963. Each of the collective bargaining agreements (except those of the Painters and Plumbers which express a purpose not to strike, but do not contain a no-strike promise) provides that there would be no strikes and that grievances would be handled according to a specified procedure.[2] The main question below, and here, is whether the dispute about the interpretation and/or application of those agreements to travel time pay and shift differential pay must be resolved by the specified grievance and arbitration procedures. The lower court assumed the authority to exercise remedial power and resolved the dispute on the merits. It believed it proper to do so because, in its view, the dispute was not arbitrable and, in any event, Reynolds had waived and repudiated the grievance and arbitration procedures. We have concluded that the judgment below must be set aside (except as to Sheet Metal Workers Union, Local

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fitting Industry, Local 525; Sheet Metal Workers International Association, Local 88; International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 631.

[2]See Appendix A where the relevant provisions of each agreement are set forth.

88) because of controlling decisions by the United States Supreme Court, to be hereinafter discussed.

When the unions called a strike and established a picket line, Reynolds immediately filed suit to enjoin the strike, work stoppage and picketing. The unions filed responsive pleadings and, by counterclaim, sought a declaratory judgment that the collective bargaining agreements required Reynolds to restore the pay practices which were in effect before December 10, 1962. Reynolds filed its reply asserting, inter alia, that the controversy should be resolved through the grievance and arbitration procedures provided for by the collective bargaining agreements. For reasons not material here, Reynolds chose not to pursue its complaint for injunctive relief and offered no evidence in support thereof. The case was tried upon issues framed by the counterclaims of the unions and Reynolds' reply thereto, and resulted in the judgment from which Reynolds has appealed. As Reynolds abandoned its complaint to enjoin the strike, we are not faced with the issue of the power of a state court to issue an anti-strike injunction in a Sec. 301 case. (Cf. Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, holding that in a suit brought under Sec. 301 of the Labor Management Relations Act, the federal court is barred from issuing an injunction against a strike over an allegedly arbitrable grievance in violation of a no-strike agreement; McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal.2d 45, 315 P.2d 322, holding that the injunctive remedial power of a state court is available in such a case; see article by Benjamin Aaron, "Strikes in Breach of Collective Agreements," 63 Col. Law Review, 1027, suggesting that the United States Supreme Court should

now rule that state courts should be prohibited from granting injunctions in such a case.) Our sole concern is whether the dispute about the interpretation and/or application of the collective bargaining agreements to travel time and shift differential pay must be resolved by the grievance and arbitration procedures. We turn to briefly explain the grievances.

The travel time pay dispute involves union employees of Reynolds who work at a particular area on the Nevada test site called "Area 400" or "NRDS" (Nuclear Reactor Development Station). Such employees live either away from the test site and travel every day to and from the site, or utilize lodge and boarding facilities at campsites located at various places on the Nevada test site. For several years the employees had reported to work at various reporting points on the test site, and Reynolds supplied transportation from the reporting points to the jobsite where they were to work. The reporting points were normally campsites. The employees were paid for the time during which they were transported from reporting points to job sites, and this pay in the travel time pay with which this case is concerned. None of the collective bargaining agreements specify the locations of reporting points. The reporting points were either designated by Reynolds before a particular job started or were agreed upon through negotiation with the unions.

Before December 1962 for basic trade employees (carpenters and joiners, plasterers and cement masons, hod carriers and laborers, operating engineers, painters), and before March 1963 for specialty trade employees (electrical workers, iron-workers, plumbers and pipefitters, and sheet metal workers). Area 400 was

not a reporting point. Employees working at Area 400 reported to work at other places and were transported to and fro, and received pay for the time spent in traveling to and from their reporting points and Area 400. Many of these employees reported for work at a campsite known as Camp Mercury, some distance from the job.

In December 1962 Reynolds designated Area 400 itself as the reporting point for basic trade employees working in Area 400, and in March 1963 did the same for specialty trade employees working there. Travel time pay for employees who had theretofore reported to Camp Mercury was stopped. Reynolds did so at the direction of the Atomic Energy Commission. A campsite was not established at Area 400. A grievance resulted. The unions contend that those employees who had previously reported at Camp Mercury and had been given travel time pay and transportation from Camp Mercury to Area 400 and return, are still entitled to such pay even though the reporting point was changed. Reynolds does not agree.

The shift differential pay dispute concerns only Reynolds and the Teamsters Union. The other unions do not object to the December 1962 change in practice with respect to the shift differential pay. Before 1962 employees working the swing shift worked seven hours per day, but were paid for eight. In December 1962 this practice was changed, and the employees were paid on the basis of hours actually worked, with a 10% premium for employees on the second shift, and a 20% premium for employees on the third shift. This change was suggested by some unions for whom it was advantageous. However, the new practice was less favor-

able than the old to the Teamsters, and gave rise to an additional grievance in that union.

We have stated the grievances in skeleton form. A mass of evidence was received about the many meetings held during 1961 and 1962 between representatives of the employer, the AEC, and the unions, pointing to the consummation of a Master Construction Industry Agreement (MCIA); about the interest of the Secretary of Labor, the Director of the Federal Mediation and Conciliation Service, the Chairman of the AEC, and others in the adoption of a MCIA. Some of that evidence may be relevant to the interpretation and/or application of the provisions of the collective bargaining agreements to the travel time pay and shift differential pay disputes. However, we shall not refer to that evidence here, for two reasons. First, because controlling law demands that the grievances be first submitted to and resolved by the contractual procedures agreed upon; and, second, if we were to discuss all of the contentions on either side resulting from the whole story, we would necessarily intimate an opinion upon the merits, and perhaps influence the grievance and arbitration procedures to be carried out. This would not be appropriate.

The United States Supreme Court has made it clear that Sec. 301(a) creates a federal substantive law governing collective bargaining agreements affecting interstate commerce.[3] Textile Workers v. Lincoln Mills, 353

[3]Sec. 301(a) of the L.M.R.A. of 1947, 61 Stat. 156, 29 U.S.C. 185(a) reads: "Suite for violation of contracts between and employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdicton of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

U.S. 448. Incompatible doctrines of local law must give way to principles of federal law. Teamsters Local v. Lucas Flour Co., 369 U.S. 96. The national labor policy expressed by Congress, and reflected by the decisions of the high court, leaves little room for court intrusion except to compel arbitration "made arbitrable by the provisions of an effective collective bargaining agreement," Sinclair Refining Co. v. Atkinson, 370 U.S. 195, or, in some circumstances, to permit a suit against the unions for damages resulting from a breach of a no-strike clause. Atkinson v. Sincliar Ref. Co., 370 U.S. 238. Contract grievance procedures are expressly approved by Congress as a preferred method for settling disputes, L.M.R.A. Sec. 203(d), 29 U.S.C. 173(d); 201(c), 29 U.S.C. 171(c); Republic Steel Corp. v. Maddox, No. 43, Oct. Term, 64 U.S. ....., 13 L.Ed.2d 580, and the policy of the national labor law will be effectuated only if the means chosen by the parties to settle their differences under a collective bargaining agreement is given full play. Steelworkers v. American Mfg. Co., 363 U.S. 564.

The cited cases were litigated in federal courts. The instant matter was litigated in our state court. Though federal law governs, it does not follow that state courts are without jurisdiction to effectuate the federal policy. Concurrent jurisdiction exists unless Congress has expressly excluded state court power. Claflin v. Houseman, 93 U.S. 30; Packing House Workers v. Needham Packing Co., 376 U.S. 247; McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322. Section 30 does not expressly exclude state power. Thus, our state court had jurisdiction to entertain this suit and afford a remedy to ef-

fectuate federal policy or to deny all requested relief, should the relief sought contravene federal policy. As before stated, the request for an injunction against the strike was abandoned by the employer and we need not, therefore, decide whether the injunctive remedial power of a state court is available in a Section 301 case. With these foundation principles in mind, we turn to resolve the issues raised by the counterclaims of the unions and Reynolds' reply thereto, viz., are the grievances here involved arbitrable and, if so, did the employer either waive the contract settlement procedures or frustrate them by repudiation?

1. Arbitrability. The lower court found that the contract provisions governing the pay practices here in question were not within the coverage of the grievance and arbitration clauses. It relied upon the rule of practice construction, noting that the pay practices which it ordered to be resumed had been in effect for many years under collective bargaining agreements containing the same pertinent language as the agreements now in issue. It reasoned that the meaning of the pertinent contract provisions had thereby become fixed and certain and, therefore, were not subject to the grievance procedures, Accordingly, the court concluded that the unilateral change of pay practices by Reynolds was a breach of the contracts authorizing resort to the court's remedial powers. In our view the lower court's position in this regard is not supportable.

As before indicated Congress has encouraged employers and unions to work out a desirable method for settlement of grievance disputes arising over the interpretation and application of collective bargaining agreements. L.M.R.A., Sec. 203(d), 29 U.S.C., Sec. 173(d).

That expression of national policy has been, from time to time, further defined by the United States Supreme Court, and standards developed for determining arbitrability. United Steelworkers v. American Mfg. Co., 363 U.S. 564; United Steelworkers v. Enterprise Wheel & Car Co., 363 U.S. 593; United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574. The trilogy of decisions reveals the Supreme Court's intention to preclude court intervention into the merits of a labor dispute where grievance and arbitration procedures have been contractually provided for.

In the American Manufacturing case, supra, at page 569 the court stated: "* * * When the judiciary undertakes to determine the merits of a grievance under guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." Further it said [page 568]: "The courts therefore have no business weighing the merits of the grievance, considering whether there is * * * particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware."

In Warrior & Gulf, supra, [page 562], the court wrote: "An order to arbitate the particular evidence should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

In Enterprise Wheel and Car Co. [page 597], supra, appears this language: "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations."

In the instant matter it may not be said with positive assurance that the coverage clauses of the agreements before us are not susceptible to an interpretation that covers the disputes. The coverage provisos are broad in scope,[4] and the contractural arrangements about

[4]Pertinent abbreviated excerpts from the agreements are:

Carpenters: "This committee shall take evidence relative to violation, interpretations, adherence and grievances * * *."

Laborers: "That it is the purpose and intent of the parties hereto that all grievances or disputes arising between them over the interpretation or application of the terms of this agreement * * *."

Operating Engineers: "It is agreed by the parties hereto that all grievances or disputes arising between them over the interpretation or application of the terms of this agreement * * *."

Painters: "The committee shall be vested with power to adjust disputes and grievances that may arise and shall be empowered to interpret and make such rules and regulations as may be necessary to give force and effect to the intent, purpose and meaning of the agreement."

Sheet Metal: "Grievances of the employer or the union, arising out of interpretation or enforcement of this agreement * * *."

Electrical Workers: "All questions or disputes which are not adjusted between the union and the employer shall be referred to this committee * * *."

Iron Workers: "Boards of Adjustment shall be created for the settlement of disputes, except jurisdictional disputes, which shall * * *."

Plumbers: "The joint committee is hereby vested with power to adjust all labor disputes and grievances which may arise * * *, and is also hereby vested with the power to interpret this agreement * * *."

Teamsters: "All disputes or grievances arising out of the interpretation or application of the terms or conditions of this agreement * * *."

travel time pay are, we believe, subject to interpretation,[5] simply because none of the agreements, except the Sheet Metal Workers agreement, expressly, or by necessary implication, preclude the employer from designating Area 400 as a campsite or require the employer to supply living quarters there, if it is so designated. We do not mean to suggest what the outcome of the travel time pay dispute should be. We state only that the unions' claims for travel time pay rest upon terms of the collective bargaining agreements which are open to the interpretive processes embraced by the grievance procedures agreed upon. Indeed when the lower court relied upon the "rule of practical construction" to reach the result it did, it indulged in interpretation, for that rule is a rule of interpretation. 3 Corbin, Sec. 558; Woods v. Bromley, 69 Nev. 96, 241 P.2d 1103; Holland v. Crummer Corp., 78 Nev. 1368 P. 2d 63.

The Sheet Metal agreement contains a clause not present in the others, to wit: "If adequate living quarters are not provided at the jobsite, in addition to the subsistence, the employee shall receive travel time and mileage, as provided herein, from the nearest place that living quarters are available." The agreement also demands that all grievances "arising out of the interpretation and enforcement of this agreement" shall be settled by the procedures therein specified. Thus, if one were to entertain the view that the sheet metal workers are entitled to travel time pay, still the enforcement of that right must come about through the procedures agreed upon. The language of the court in the American Manufacturing Co. case, supra, is particularly appropriate

[5]See Appendix B where the travel time pay provisions are substantially set forth.

here. We repeat it: "The Courts therefore have no business weighing the merits of the grievance, considering whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court would deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware."

The Sheet Metal Workers Union did utilize the grievance procedure specified in its contract[6] and the Local Adjustment Board ruled in its favor. The contract specifies that the Board's decision shall be final and binding. That decision determined that Reynolds was required to pay travel time. It also found that Reynolds had discontinued doing so because of a directive from the AEC. Reynolds has not complied with the Board's ruling, contending that it does not amount to an "award" because the Board failed to decide one point presented to it, namely: was AEC approval of pay practices an implied condition of the collective bargaining agreement between Reynolds and the Sheet Metal Workers? In our view the Board decided that question when

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[6]The grievance procedure in pertinent part reads: "Section 1. Grievances of the Employer or the Union, arising out of the interpretation or enforcement of this Agreement, shall be settled between the Employer directly involved and the duly authorized representative of the Union, if possible. An Employer may have the local Association present to act as his representative. Section 2, Grievances, not settled as provided in Section 1 of this Article may be appealed by either party to the Local Joint Adjustment Board in the area in which the work is performed and such Board shall meet promptly, but in no more than seven (7) calendar days following the request for its services, to render a final and binding determination, except as provided below." [The exceptions do not relate to the merits of this dispute and are not relevant. We have, therefore, omitted them.]

it determined that Reynolds must pay travel time to the Sheet Metal Workers. Implicit in the ruling is the Board's conclusion that AEC approval is not an implied condition of payment. The Board "interpreted" this contention and resolved it against Reynolds. The merits of the dispute were decided in the manner agreed upon. The two-step grievance procedure was exhausted. A final and binding award was made in favor of the Sheet Metal Workers Union. No further grievance procedure was contemplated by the agreement. In these circumstances we do not hesitate to treat the counterclaim of the Sheet Metal Workers Union as a suit to enforce the award and affirm the judgment as to that union.

We proceed to the arbitrability of the shift differential pay dispute between Reynolds and the Teamsters Union. As in the case of the Sheet Metal Workers and its travel time dispute, one might consider the contract language about shift differential pay in the Teamsters' agreement to be unambiguous.[7] However, unlike the Sheet Metal Workers, the Teamsters did not exhaust the grievance procedures agreed upon. The parties had agreed to submit "all disputes or grievances arising out of the interpretation or application of the terms or conditions of this agreement" to the grievance procedures therein provided for. The first step in the procedure, that of submitting the dispute to the Joint Conference Board, was undertaken. The Board deadlocked. The second step, the selection of an impartial

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[7]The language: "When three (3) shifts are worked, each shift shall work seven (7) consecutive hours, exclusive of meal period, for which eight (8) hours' straight time shall be paid Monday through Friday."

arbitrator, was started but not completed.[8] The shift differential pay dispute with the Teamsters, therefore, is not ripe for court enforcement.

We think is particularly significant that none of the collective bargaining contracts before us specifically exclude the disputes here involved from resolution by the grievance and arbitration processes. I.B.E.W. v. Westinghouse Electric Corp., 198 F.Supp. 817 (where the unions seek to sustain their judgment mainly on the proposition that the court ordered arbitration because the bargaining agreement contained no specific exclusionary language); cf. Communications Workers v. Telephone Co., 209 F.Supp. 389 (where arbitration was refused because of the exclusionary language of the contract). It seems to us that if Reynolds and the

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[8]The pertinent language is: "D. If a majority decision is reached by the Joint Conference Board, that decision shall be final and binding upon the parties to the dispute. In the event that a majority vote cannot be secured within twenty-four (24) hours by the Joint Conference Board, a deadlock shall be declared after which either the Association or the Union may refer the matter in dispute to an impartal arbiter in accordance with the following procedure:

"The party electing to arbitrate shall notify the other in writing of its desire to do so. Upon receipt of such notice the manager of the Association and the Secretary-Treasurer of the Union (or their designated representatives) shall attempt to select an impartial arbiter acceptable to both.

"If, within twenty-four (24) hours of receipt of the notice to arbitrate said representatives are unable to agree upon the impartial arbiter they shall jointly petition the Federal Mediation and Conciliation Service to submit a panel of five (5) names of persons qualified to act as the impartial arbiter. Upon receipt of said panel of names, the representative of the Union and the representative of the Association shall each alternately strike a name until four of the five names submitted have been eliminated. The fifth or remaining nominee shall be the impartial arbiter.

"The arbitration hearing shall be scheduled as soon as possible thereafter and the arbiter shall be required to issue his decision within forty-eight (48) hours of the close of the hearing unless the parties mutually agree, in writing, to an extension of time."

unions had been unwilling to accept the grievance and arbitration procedures as the means for adjusting the travel time and shift differential pay disputes, they would have so expressed themselves by appropriate exclusionary language. John Wiley & Sons v. Livingston, 376 U. S. 543. None appears. For all of the reasons stated, we hold that the disputes before us are within the scope of the grievance and arbitration clauses of each of the collective bargaining agreements.

2. *Waiver or Repudiation of Arbitration.* The unions seek to sustain their judgment mainly on the proposition that Reynolds, by its conduct, either waived the contractual grievance and arbitration procedures, or repudiated them, thereby authorizing a court determination on the merits. We do not so view the record. It is, of course, possible for a flat waiver or repudiation to occur. The circumstances must be examined with care. In Drake Bakeries v. Bakery Workers, 370 U. S. 254, the United States Supreme Court stated, inter alia: "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach; and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." In the Drake Bakeries case the court held that where both parties are committed by contract to arbitrate their claims of breach of agreement, the fact that a union strikes rather than arbitrates its claims does not necessarily excuse an employer from its obligation to arbitrate. Accord: Packinghouse Workers v. Needham Packing Co., 376 U. S. 247; see also Annot., 8 L.Ed.2d 1013.

The language of the high court in Drake Bakeries is particularly significant here. Though the unions claim a repudiation, the record is devoid of evidence showing that the employer was unwilling to pursue the grievance procedures agreed upon. All of the evidence is the other way. The Carpenters Union sought to have arbitration waived. Reynolds refused. The Union then selected an arbitrator, but did not proceed further. The Operating Engineers Union instituted grievance proceedings. The Joint Conference Committee, after hearing the evidence, deadlocked. The Union then requested that Reynolds waive the next step in the grievance procedure, and Reynolds refused. Nothing more was done. The Plumbers Union wrote Reynolds that the Union was willing to arbitrate. Reynolds responded, suggesting that the Union wait until conferences then in progress were concluded, for the matters in dispute were being discussed. Nothing further occurred. As before indicated, the Teamsters instituted grievance proceedings, but did not complete them. The Plasterers and Cement Masons, the Electrical Workers, the Ironworkers, the Laborers and the Painters did not seek to utilize the grievance procedures to resolve the travel time pay dispute. The evidence is uncontradicted that the employer willingly participated in every grievance procedure instituted and has steadfastly maintained throughout that the disputes be resolved as contractually agreed upon and not otherwise. "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach; * * *." Drake Bakeries v. Bakery Workers, supra. Here it is evident that the employer did not breach or repudiate the arbitration provisions of the various contracts. Its breach, if any occurred, was of

the provisions of the agreements governing travel time and shift differential pay. That kind of a breach is survived by the arbitration provisions. Therefore, the unions' failure to arbitrate is not excused, nor has arbitration been waived or repudiated by Reynolds.[9]

The employer's unilateral change to pay practices does not, as a matter of law, constitute a repudiation of its promise to arbitrate. For the same reason, any indication in this record that the employer would not abide by a final and binding arbitration award without the approval of the AEC does not, as a matter of law, amount to a repudication of its promise to arbitrate. An award, if made pursuant to the agreed procedures, may be enforced by a suit upon the award. United Steelworkers v. Enterprise Corp., 363 U.S. 593. Nor does the instant law suit, commenced by the employer, amount to a repudiation of its promise to arbitrate, for by this action Reynolds sought to preserve the status quo until the grievances could be resolved by the procedures contractually agreed upon.

The judgment below in favor of Sheet Metal Workers International Association, Local Union 88, is affirmed. In all other respects the judgment below is reversed.

Thompson *J.*

We concur:

Badt *J.*

Bowen *D. J.*

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[9]The cases relied upon by the unions are inapposite. In each there was a flat refusal by the employer to participate in the arbitration process. See In Re Aller's Petition, 47 Cal. 2d 189, 302 P.2d 294; Berterov Superior Court, 216 Cal.App.213, 30 Cal. Rptr. 719; Council of West. Elec. v. Western Elect. Co., (Circ. 2), 233 F.2d 892.

APPENDIX B.

Order Denying Petition for Rehearing.

In the Supreme Court of the State of Nevada.

Reynolds Electrical & Engineering Co., Inc., Appellant, v. United Brotherhood of Carpenters and Joiners of America, Local Union 1780, et al., Respondents. No. 4761.

John W. Douglas, Assistant United States Attorney General; Morton Hollander and John C. Eldridge, Attorneys, Department of Justice; all of Washington, D.C.; and John W. Bonner, United States Attorney, of Las Vegas, for Appellant.

Morton Galane, and George Rudiak, of Las Vegas, for Respondents.

Per Curiam:

Rehearing denied.

Dated: May 24, 1965.

Thompson *J.*

Badt

Office of
Clerk of the Supreme Court
C. R. Davenport, Clerk
Carson City, Nevada

May 24, 1965

Hon. Helen Scott Reed
Clark County Clerk
Clark County Courthouse
Las Vegas, Nevada

Dear Mrs. Reed:

Re: Reynolds Electrical & Engineering Co. v. United Brotherhood of Carpenters and Joiners, No. 4761 (A 107)

I am enclosing the Remittitur, Receipt for Remittitur, and certified copy of the opinion in the above matter.

Please sign the receipt and return it to this office by return mail.

In compliance with Rule 75 (i) NRCP, I am also enclosing and returning to your custody the original exhibits which were sent to us in this case.

Sincerely yours,

C. R. Davenport, Clerk

dpw
Enclosures
cc:
Hon. John W. Douglas, Assistant United States Attorney General
Hon. John W. Bonner, United States Attorney
Morton Galane, Esq.
George Rudiak, Esq.